IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 5TH NOVEMBER 2007 / 14TH KARTHIKA 1929

Ex.FA.No. 21 of 2007()

AGAINST THE ORDER DATED 24/03/2007 IN EA 91/07 IN EP 116/03 IN OS.14/1988 of PRINCIPAL SUB COURT, PALAKKAD
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APPELLANT/CLAIM PETITIONER/3RD PARTY

NANI, W/O.LATE KESAVAN, KOLAPPADAM HOUSE, KUNISSERY, ALATHUR TALUK, PALAKKAD DIST.

BY ADV. SRI.SAJAN VARGHEESE K.

RESPONDENTS: RESPONDENTS/DECREE HOLDER & JUDGEMENT DEBTORS
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1. RAGHAVAN, S/O.KUNCHU, KARAPPADAM HOUSE, MUDAPPALLUR AMSOM, ALATHUR TALUK, PALAKKAD DIST.

2. NARAYANAN, S/O.KUNCHU, -DO- -DO-

3. KRISHNAN, S/O.KUNCHU, -DO- -DO-

4. SYAMALAKUMARI, W/O.PREMAKUMARAN, -DO- -DO-

5. SHARMILA, W/O.GOKULAN, KADALAKURISSI, KANNADI AMSOM, PALAKKAD TALUK.

6. RAJESH, S/O.PREMAKUMARAN, ADVOCATE, KARAPPADAM HOUSE, MUDAPPALLUR AMSOM, ALATHUR TALUK, PALAKKAD DIST.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON
SRI.JIBU P THOMAS

THIS EXECUTION FIRST APPEAL HAVING COME UP FOR ADMISSION ON 05/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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EX.F.A. NO. 21 OF 2007

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Dated this the 5th day of November, 2007

J U D G M E N T

The appeal itself is heard and disposed of.

2. The claim petitioner, who is a third party to the decree passed in O.S. No.14 of 1998 on the file of the Sub Court, Palakkad, is the appellant.

3. Plaintiffs-decree holders filed a suit for partition of the assets of late Shri Kunju. It was contended that deceased Kunju had left widow and 4 sons and each one of them had 1/5th share in the suit property. A preliminary decree was passed which followed by a final decree application which culminated in a final decree. When the decree holders attempted to take delivery of the properties, appellant, who claims to be the daughter of deceased Kunju, filed a petition, E.A. No.91 of 2007 contending that deceased Kunju had 4 sons and 5 daughters and each of them are entitled to get 1/9th share. She contended that she cannot be dispossessed of the properties scheduled in the petition. Before the executing court, decree holders took up a contention was

raised that the remedy available to the appellant is to file a suit for partition. Decree holders contended that even if the contention of the appellant is accepted in toto she is entitled to only 1/9th share over the items to be delivered and she has no right to resist delivery of the entire properties. It was further contended that she will have to works out her remedies by filing a separate suit. Learned counsel for the the appellant relied on a decision reported in Ashan Devi v. Phulanwasi Devi (AIR 2004 SC 511) and has argued that there is absolutely no justification in asking the true owner to surrender the property and then file another suit to get her share.

4. Even if the entire case of the appellant is accepted in toto, she can claim only 1/9th share in the petition scheduled properties. Apprehension of the appellant is that if delivery is effected and she files the suit for partition, decree holders will raise a contention that the appellant will have to value the suit for partition under Section 37(2) of the Court Fees Act and she will be compelled to pay ad valorem court fee on the market value of the property. Further apprehension of the appellant

is that the decree holders will raise a contention of res judicata in view of the provisions contained in Order XXI Rule 97 of the Code of the Civil Procedure. The proper remedy available to the appellant is to file a suit for partition. I make it clear that the decree holders shall not be allowed to raise the contention of res judicata in view of their stand in the petition that the remedy available to the appellant is to file a fresh suit for partition. I also make it clear that delivery effected by the decree holders will enure to the benefits of the appellant also. If a fresh suit for partition is filed by the appellant, she need not pay any court fee under Section 37(2) of the Court Fees Act and she need value the suit under Section 37(1) of the Act.

5. Learned counsel for the decree holders submitted that in fact in this case delivery of the properties had already been effected and the decree holders were put in possession of the properties. The decree holders shall not alienate the properties for a period of three months from today. I make it clear that I am not considering the question whether the appellant is a co-sharer and she is entitled to a share in the

properties. That question is left open to be decided in appropriate proceedings.

6. Appeal is disposed of in the above terms.

Interlocutory Application No.1374 of 2007 shall stand closed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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EX. F.A. NO. 21 OF 2007

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J U D G M E N T

5TH NOVEMBER, 2007